A CONTRACTUAL APPROACH TO DUE PROCESS

R. GEORGE WRIGHT*

I. INTRODUCTION

Few constitutional law issues have generated as much controversy over the past two decades as those involving due process hearing requirements. The Supreme Court has at times, particularly under the influence of now Chief Justice Rehnquist, been reluctant to add procedural requirements beyond those clearly and expressly imposed by statutory language. This approach has, however, now fallen almost completely out of favor with the members of the Court and with most academic critics.

This Article reinterprets and expands upon the basic Rehnquist approach by means of standard contract law analysis. While some due process contexts, such as those involving claims of prisoners, welfare recipients, or, arguably, public school students, are, at best, no more easily resolved through a contract law analysis, other, at least equally important and frequently litigated cases, including those involving the procedural rights of college students and government employees, are most easily and convincingly resolved along lines suggested by the private law of contracts and contract defenses.

The context chosen to illustrate this process herein will be that of government employees who have, against their wishes, been dismissed from their positions. The typical result of such an analysis, it will be found, will, with some exceptions, be more nearly in accord with the results of the Rehnquist approach than with those of the current Court majority. A contractual approach to due process thus provides a simple, broad critique of contemporary procedural due process doctrine.

II. THE REHNQUIST ANALYSIS

Justice Rehnquist's initial analysis in the due process case of *Arnett v. Kennedy*, to which he continues to adhere, has recently been concisely summarized by Justice Rehnquist himself, dissenting in *Cleveland Board of*

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* Associate Professor of Law, Cumberland School of Law, Samford University. The author wishes to thank Associate Dean Alexander J. Bolla and Professor Howard Walthall for their observations and encouragement.

Education v. Loudermill,[1] and by the Court majority in the same case.[2]

The Rehnquist analysis and the current majority analysis share certain elements. Held in common is the view that the claim of due process violation depends upon a showing by the employee of a property right in continued employment, where that property right or interest was created and defined by some source independent of the Constitution,[3] such as state statute, regulation, common law, or contract between the parties.

The Rehnquist and the majority approaches part company, however, over the status of the argument that the scope and definition of the property right or interest is determined not merely by the narrowly substantive granting language, but by any clearly expressed relevant language of process or procedure in terminating or revoking the more narrowly substantive entitlement, where the specified procedures were adhered to by the employer in the given case.[4]

The Rehnquist approach asserts the impropriety of severing the narrowly substantive language of rights from the explicit procedural language clearly governing termination of the substantive interest conferred by the statute. In the famous phrase, the Rehnquist approach concludes that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a [claimant] must take the bitter with the sweet."[5]

The essential logic of the Rehnquist position is that the courts should in this instance, at least prima facie, uphold and give effect to a clear legislative compromise,[6] in the absence of any reason to assume that Congress or a state legislature must, as a constitutional matter, be put to a choice between not conferring at all a right that might not otherwise exist, and conferring it with greater procedural protection than Congress or the state legislature thought appropriate.[7]

In his dissenting opinion in *Loudermill*, Justice Rehnquist quoted extensively from his opinion for the plurality in *Arnett*. His view was that "[o]nly by bifurcating the very sentence of the Act of Congress which conferred upon [the employee] the right not to be removed save for cause could

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1. 105 S. Ct. 1487, 1502 (1985) (Rehnquist, J., dissenting).

2. *Id.* at 1492.

3. *Id.* at 1491 (quoting the Court's own original formulation of this approach in Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

4. *Compare* 105 S. Ct. at 1492-93 (current, majority approach) *with id.* at 1502-03 (Rehnquist, J., dissenting).

5. Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974)(plurality opinion) *quoted in Loudermill*, 105 S. Ct. at 1492.

6. 416 U.S. at 154 (plurality opinion).

7. *Id.*

it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it."[8] In *Arnett*, "the very section" of the right-granting statute "expressly provided also for the procedure by which 'cause' [for employee termination] was to be determined."[9]

Crucial to the Rehnquist analysis, then, is simultaneous conferral of a substantive right and enforceability limitations, where the legislature's intent as to the latter is found to be as conscientious and explicit as to the former. Justice Rehnquist continues to believe, then, that for due process purposes, statutory rights of employees need not be simply granted in the abstract. As he concluded in *Loudermill*:

> We ought to recognize the totality of the State's definition of the property right in question, and not merely seize upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the State has inexorably conferred upon a civil service employee something which it is powerless under the United States Constitution to qualify in the next paragraph of the statute.[10]

While Justice Rehnquist's approach is often discussed in terms of an "inextricable intertwining"[11] of the presumed substance or substantive grant and the annexed procedural limitations or requirements, the metaphor of intertwining plainly adds nothing to his analysis. The basic requirement on the Rehnquist analysis is simply that the legislature "paid close attention to"[12] the procedures imposed and that the procedural protections expressly attach or refer to the more narrowly substantive statutory entitlement.[13] That the procedural and more narrowly substantive language were physically close to each other is generally immaterial.

As a final preliminary matter, it is irrelevant for our purposes whether one views the Rehnquist analysis in *Arnett* as concluding that no property interest was taken, or that the only property interests taken were taken with due process.[14] Our more explicitly contractual reinterpretation and develop-

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8. 105 S. Ct. at 1502 (Rehnquist, J., dissenting)(quoting *Arnett*, 416 U.S. at 152 (plurality opinion)).

9. 105 S. Ct. at 1502 (Rehnquist, J., dissenting)(quoting *Arnett*, 416 U.S. at 152 (plurality opinion)).

10. 105 S. Ct. at 1503 (Rehnquist, J., dissenting).

11. *See supra* text accompanying note 5.

12. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 154 (1983).

13. *See* Saphire, *Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 130 (1978).

14. *See* Terrell, *"Property" "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861, 889 n.152 (1982)(in a sense, no deprivation of anything); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the*

ment of the Rehnquist approach, and the limitations of that approach, should be essentially the same under either view.

III. CONTRACTUALISM IN GOVERNMENT EMPLOYMENT RELATIONS

Reflecting on the Court's treatment of procedural due process cases, Professor Tribe has maintained that the cases at least up until recently may be best understood on a theory of the judicial role of "enforcing, according to their terms, the commands of the sovereign."[15] A command-of-the-sovereign approach, however, tends to exaggerate any elements of arbitrariness and imperiousness, democratic or otherwise, present within the system of due process.

In contrast, this paper's contractualist reinterpretation and elaboration of the Rehnquist approach both better displays its ability to withstand the familiar criticisms of the Rehnquist approach, and exposes more clearly its inherent, unavoidable limitations.

At the outset, confusion must be avoided as to whom the parties to the contract are taken to be. On the theory developed in this Article, the relevant contract is not assumed to be between the legislators on the one hand and their various supporters, political or financial, or lobbyists, or competing interest groups on the other.[16] Nor will our focus be solely on government employees as burdened or benefitted under a statute, a view ascribed to Justice Rehnquist.[17]

Instead, our focus will be on the presumed interaction or mutual expression of preferences and priorities, as mediated by the legislature, of both employer and employee groups, who are assumed to have both common and conflicting interests. The contractual model eleborated at the group level is supplemented and reinforced by any contractual relationship developed at the level of the particular, individual employee and his employer.

We are already moving in the direction of contractual analysis when we recognize that "private groups often have an important role in drafting

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Administrative State, 62 CORNELL L. REV. 445, 463 (1977) (limited vested property right not threatened by government's action); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 437 (1977)("all nine Justices agreed that the employee had a sufficient property interest to trigger due process scrutiny").

15. Tribe, *Structural Due Process*, 10 HARV. C.R. - C.L. L. REV. 269, 277 n.24 (1975).

16. *Cf.* Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231 n.42 (1986).

17. *See* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 177 (1983).

statutes."[18] Obviously, the influence of one group does not necessarily exclude the influence in reponse of a partially antagonistic group. It is this resolution of interest group forces, or their interaction, that may embody, to greater or lesser degree, some or all of the elements of an ordinary contract, agreement, or understanding, and that gives rise to a legislative "compromise."[19]

Admittedly, the concept of a legislative "compromise"[20] is ambiguous. It may suggest no more than a legislator or group of legislators actively seizing the initiative and authoritatively resolving an irreconcilable dispute between private groups by simply splitting the differences according to their own lights. "Compromise" may, on the other hand, reflect or partake of negotiation or bargaining among some or all directly affected parties or interest groups. This latter sense of "compromise," in which the elements of an ordinary contract tend to loom larger, is suggested by the view of lawmaking as resulting in "a series of accomodations."[21]

We need not assume, for purposes of our contractual analysis, that any given instance of statutory lawmaking generating a procedural due process inquiry need rise to the level of a technically pure and unassailably complete and enforceable private contract between the directly affected parties, the government employer and the government employees or union or their agents. The crucial point is that to the degree that a given set of circumstances or transactions approaches, resembles, or partakes of the nature of a contract, contract law to that degree, all else equal, supplies normative force to the legislative arrangement. To the degree that a contract analysis supplies normative force, at least prima facie, the natural inference will be that one should most appropriately look to the standard sorts of contract law defenses, excuses, and justifications if one wishes to avoid or modify the application of the legislatively-enshrined "contract."

While it is certainly possible to deprecate a particular statute as the product of an "interest-group deal," the very notion of a "deal," or of bargaining, should "give rise to a heavy presumption of enforceability."[22] It is certainly plausible to reconstruct a statute conferring narrowly substantive and procedural rights and obligations on government employers and employees with respect to tenure and termination in terms of offer, acceptance, or at least bargained-for terms, and consideration. Theories of contract law

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18. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 71 (1985).

19. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 & 894 n.23 (1982)(citing Supreme Court recognition of an effectuated legislative compromise).

20. See the summary analysis in *id.* at 900.

21. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985)(referring to the views of "competing elite" theorists).

22. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 320 (1986).

that focus, respectively, on will, reliance, fairness, efficiency, bargain, or consent[23] can all directly contribute to our descriptive and normative understanding of the employment statutes in question.

The contractual approach avoids the crudeness of certain interest group theories of legislation that view statutes "as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups."[24] In our central cases, it is more fruitful, and more realistic, to view the statute not as a unitary purchase or prize, but as an entity subject to "joint" or "minority" ownership reflective of bargaining, compromise, or mutual accomodation of preferences and priorities based partly on the relative willingness and ability of each party to pay.

Just as our theory does not assume sole and exclusive ownership of the relevant employment tenure and termination statues, so it does not assume or rely upon any judicial ability to accurately reconstruct the precise "complex array"[25] of bargaining patterns and motivations that resulted in legislative enactment of the statute in question. Judge Easterbrook has argued that in at least certain cases, an analyst or judge might ask: "Who lobbied for the legislation? What deals were struck in the cloakrooms? Who demanded what and who gave up what?"[26] Our approach, in contrast, looks only to whatever contractual elements may be fairly inferred from a general, broadly applicable theory of interest group bargaining and the text of the statute itself, and gives more developed scope to contract-based defenses and excuses in judicially interpreting the contract, or contracts, that are detected than does Judge Easterbrook's.[27]

Our greater concern for contract-law defenses as cues or permissions for judicial reinterpretation or non-enforcement of a statute in an appropriate case does not mean, however, that our approach is generally more redistributive than Judge Easterbrook's. Presumably, some interest group bargains could not be struck at all, or would be differently struck, if the parties anticipated the relatively searching inquiry into cloakroom machinations

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23. This typology is drawn from *id.* generally and at 269 in particular.

24. *See* Macey, *supra* note 16, at 227.

25. *See id.* at 228.

26. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984).

27. *Cf.* Macey, *supra* note 16, at 236 ("Judge Easterbrook concludes that the quality of a judge construing a statute is determined by his ability to seek out and enforce the nature of the original agreement between the legislature and the special interest group"). On our approach, of course, the legislature itself is not regarded as a relevant contracting party, for purposes of the due process analysis. While Judge Easterbrook is in fact willing to view the contract as between the special interests, he does not pursue the possible applicability of traditional contract defenses to enforcement. *See* Easterbrook, *supra* note 26, at 18.

endorsed by Judge Easterbrook.[28]

From a different perspective, Professor Richard Stewart has skeptically noted that "[a] statute is a curious form of 'contract.' How does one identify the parties to it?"[29] While this task, as formulated, appears daunting, our approach does not require full identification and specification of the complete roster of parties bound by one statutory provision or another. In our typical government employment circumstance, it will be plain that the rights and obligations of both the employer and the employees, collectively and individually, are implicated by the statutory terms, and that both parties to the due process of employment termination case were represented, if perhaps by agents, in the relevant bargaining processes. Of course, any individual employee will normally be held bound by any statutory terms incorporated, by reference or otherwise, into the individual employment agreement or contract to which he expressly consented, as evidenced by his signature, at the outset of his employment term.

Despite the loose usage in the interest group theory literature, there is, further, no reason to assume that a single statute, as a whole, will constitute the single relevant contract involved. Certainly, the relevant employer-employee contract regarding employment termination may be embodied by only one or two sections of a broader statute.

Our theory, therefore, unlike Judge Easterbrook's, does not require that the courts conduct any inquiry into what a rational, or a wealth-maximizing, legislature would want.[30] Our focus is instead generally upon actual written terms, with there generally being no need to supply or interpolate rational or standard missing terms.

Similarly, our approach does not rely on Judge Easterbrook's view that the legislature, having created the substantive job entitlement in the first place, is, as opposed to the courts, the "logical judge" of how much process or procedure is due upon employee termination.[31] Whether the courts are instead the logical judge of these sorts of due process matters is of course largely the point at issue; the primary virtue of our approach is that it becomes possible to say to the disappointed party not merely that the right institution decided the question, but that the disappointed party agreed, in one form of contract or another, to the result, or to the process that led to the result. Ultimately, consent or agreement, at least under appropriate cir-

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28. *See supra* text accompanying note 26.

29. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1551 (1983).

30. *Cf.* Easterbrook, *Due Process and Parole Decision Making*, in PAROLE IN THE 1980S 77, 91 (B. Borsage ed. 1981).

31. *See id.* at 94. *See also* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 883-84 (1982).

cumstances, is among the most powerful of moral justifications.[32]

That one of the parties to the contract, or one of the negotiators, is the government or a government agency does not tend, ordinarily, to impair the validity of our contractual analysis. While the notion of government may suggest monopoly, and the possibility of monopoly bargaining power, in the typical run of our due process of employment termination cases, the government, through its actions or its very existence, will not tend to have narrowed appreciably the employment options otherwise available for actual or prospective government employees.[33] *A fortiori*, the government will not have driven out of existence otherwise available private sector jobs for teachers, office clerical workers, etc., featuring a private sector analogue of the sort of vigorous, painstaking due process of dismissal sought typically by the employee plaintiffs in the government job termination cases.

Finally, our approach does not assume that the legislative process is devoid of genuine public interest considerations.[34] Even in those instances, though, in which the government employer and employee negotiators are driven by opposed senses of the public interest or of their own group interest to the extent that no relevant contract, or semblance of a contract, can be said to be embodied in the statute, it may nonetheless be reasonable to conclude that their advocacy of public and private or group interest, as reflected in the statute, has served to "potentiate" any later employment contracts entered into between the government and individual employees.

Thus our approach does not maintain that any statute is ever utterly reducible to a publicly solemnized or publicly mediated agreement among private parties.[35] Our approach in fact insists, on the contrary, that the type of government employment statute at issue in our cases should also be viewed as an instrument that may affect the rights of third parties and as an instance of authoritative "government speech,"[36] implicating the general citizenry's interest, or right, to perspicuousness in government speech.

IV. THE TERMS OF THE GOVERNMENT EMPLOYMENT BARGAIN

To reinforce, as well as to implement, the general contract approach to due process, it must be shown that the sorts of admittedly sharply limited procedures in event of employee dismissal specified by the relevant statutes,

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32. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971).

33. *See* Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3, 28 (1983).

34. *Cf.* Stewart, *supra* note 29, at 1550.

35. For a brief contrast between the "public interest" and "interest group" conceptions of the legislative process, see R. POSNER, THE FEDERAL COURTS 262-63 (1985).

36. Many aspects of the constitutional problems associated with "government speech" are addressed in M. YUDOF, WHEN GOVERNMENT SPEAKS (1983).

and not those statutory procedures as augmented by reviewing courts in the name of due process, would be voluntarily chosen and agreed to, in advance, by the relevant, directly affected parties, including individuals in the position of Roth[37] and Kennedy[38] and Loudermill.[39] Any additional, unbargained-for procedural rights conferred by the courts on employees should be subject to justification via traditional contract law principles, lest the court be guilty of simply rewriting a contract on the basis only of its own unsolicited conception of fairness.[40]

In this regard, it is important to recognize that termination procedures agreed to voluntarily by government employers and employees should not simply be expected to maximize the achievement of any single aim or purpose or goal, including the elaborateness or the extent of procedural safeguards afforded upon termination.[41] There will, for each party, be tradeoffs and competing goals.

Nor should we conclude that the limited, precisely specified procedural rights accorded the employees in cases like *Roth*, *Arnett*, or *Loudermill* are explainable as simply reflecting an absence of agreement between the parties. If employers and employees are in unresolvable disagreement as to appropriate procedural rights and obligations in the event of employee termination, the relatively unequivocal language of the statutes in the cases immediately above is hardly the most obvious or satisfactory outcome. Irreconcilable differences between employers and employees are more plausibly reflected by much vaguer drafting techniques, such as vacuous phrases — "to the extent feasible" — or "empty standards, lists of unranked decisional goals, and contradictory standards"[42] regarding dismissal procedures.

As well, we should resist the temptation to simply assume[43] that a government employee, or prospective employee, or his union, will tend to be utterly without power to bargain over or exert upward pressure on the level of procedural protection accorded on termination, if termination process rights are genuinely valued.

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37. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

38. *See* Arnett v. Kennedy, 416 U.S. 134 (1974).

39. *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1987). For further discussion of *Loudermill*, see Flax, *Liberty, Property and the Burger Court: The Entitlement Doctrine in Transition*, 60 TULANE L. REV. 889 (1986).

40. For a repudiation of this role in the context of private parties, *see, e.g.*, Broad v. Rockwell Int. Corp., 642 F.2d 929 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981); Yankee Atomic Elec. Co. v. New Mexico and Arizona Land Co., 632 F.2d 855 (10th Cir. 1980); Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174 (3d Cir. 1979).

41. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 208, 220 (1976).

42. *See* Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 478 (1985).

43. *See, e.g.*, Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 449 (1977).

Any theory that minimizes the existence or value of employee or union bargaining over termination procedures on grounds of alleged employee powerlessness must first account for the overwhelmingly important fact of a remarkably low employee dismissal rate in the federal civil service. Professor Frug reported a dismissal rate, for the years 1972 through 1974, of 0.02%, or one employee dismissal for every 5,000 employees.[44] One crucial implication of this rate is that whether or not one wishes to consider it too low on efficiency grounds, it provides an obvious and powerful incentive for relevantly placed government employees to limit the priority they accord to their procedural rights upon the unlikely event of dismissal.[45]

Even if employee dismissal rates were much higher, we should not be surprised by agreed-upon limited procedural rights upon termination between parties of equal bargaining strength.[46] Contracts terminable utterly at will, with essentially no procedural rights, are commonly observed between parties of roughly equal bargaining power.[47] Professor Epstein's argument in this regard can be extended to suggest that an absence of employee bargaining power sufficient to call into question the validity of an apparent agreement on the extent or degree of procedure appropriate in termination cases should manifest itself, at least with some frequency, in an employee being bound to the employer for a term, at the employer's option, where the employer retains the right to dismiss the employee at will.[48]

Granting that government employees are not utterly playthings of their fate, it is still technically possible to argue that the level of termination procedures specified by statute is only superficially a reflection of the intent and agreement of the parties. Perhaps it was intended, and expected by the parties, at the time of enactment, that the judiciary would intervene to add to the employees' procedural rights, and add to employers' obligations, in

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44. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 n.13 (1976). This figure has been cited in Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 165 n.57 (1983).

45. While it is possible to argue that low dismissal rates are due not to employee bargaining strength, but largely to the threat of judicial expansion of the procedural rights of otherwise powerless employees upon termination, this argument carries the burden of inherent implausibility, as well as its difficulty in accounting for low termination rates prior to the era of judicial expansion of statutory procedural rights on due process grounds.

46. The notion of equality or inequality of bargaining power is best explained by those seeking to set aside a formally valid contract. If the notion of inequality of bargaining power is essentially that a prospective employee has very little practical choice about accepting an offered government job, or that government employee unions are essentially without influence over procedural matters, then the arguments raised in this section must be rebutted.

47. *See* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 965-66 (1984).

48. *See id.* at 973.

the name of due process. This possibility has been raised in other contexts.[49] As it is always possible, however, to claim that any agreement was intended to be judicially rewritten later to favor a particular party, it is incumbent upon a critic of the contract approach to show, for example, that the government employer actually expected and agreed in advance to the litigated outcome of what appear to be hard-fought employee termination cases resulting in a judicial expansion of employee procedural rights.

A simpler contractual analysis, in contrast, carries more plausibility. Risk-neutral or even risk-aversive employees may well prefer a package of slightly higher benefits, with minimal or no enforceable procedures on termination, as long as they anticipate a continuing pattern of remarkably infrequent involuntary job terminations. After all, more procedure does not guarantee redress or reversal of an unfavorable decision. Employees may reason that in the unlikely event of dismissal, they may well learn the reasons for employer dissatisfaction and have an opportunity to respond, sheerly out of the employer's own self-interest, in the absence of any statutory procedures at all.[50]

Even assuming that additional procedure on termination is utterly without cost to the employee, in time, money, humiliation, or embarassment, the employee may well be motivated to trade off procedural rights of

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49. *See, e.g.*, Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1553 (1983). *Cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 66 (1982)(statutorily fixed dollar amount as intended by parties to automatically self-destruct, over time, due to inflation).

It might relatedly be argued that the parties may contract with a view to the common law judicial tendency to critically scrutinize contract provisions relating to, or more particularly, limiting the enforceable remedies a party may have upon the other party's breach or default. *See, e.g.*, E. FARNSWORTH, CONTRACTS § 12.18, at 895 '(1982). *See also* Note, *Fairness, Flexibility, and the Waiver of Remedial Rights by Contract*, 87 YALE L.J. 1057 (1978) ("functional equivalent" of an adequate hearing must be provided).

In our typical cases, of course, we are not concerned with adequacy of remedies post-breach. The issue, typically, is instead whether the employer has breached, or dismissed the employee on improper grounds, or upon less than the contractually specified procedures. An employer who improperly dismisses an employee in these senses, or breached, is on our theory, subject to the full panoply of remedies on behalf of the employee, contractual or judicial.

It may be that the contractualist analysis is not equally suitable in other contexts. *See, e.g.*, Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985). But while it may be sensible to deny, for example, that a stock purchase constitutes an implicit consent to managerial self-dealing, our employment contexts ordinarily involve employee unions, lobbyists, or other experienced, expert players acting with presumably reasonable fidelity to the interests of the bulk of employees.

50. While the Kafkaesque predicament of an employee who is dismissed without any explanation has been raised, *see, e.g.*, Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 448-49 (1977), it is, as discussed further below, questionable how much a rational federal employee would pay, in other benefits foregone, to obtain greater assurance of some explanation for an unlikely future dismissal.

dubious actual value for slightly more of other job benefits.[51] The argument below will suggest why in further detail. For the moment, we might simply note the possible objection that quite often, employees will tend to irrationally discount the obviously small probability of an unexplainable involuntary job dismissal, in the same way, perhaps, that many of us irrationally fail to wear seatbelts while driving. On this objection, a judicial rewriting of voluntarily agreed-to procedures simply supplies rationality.

Certainly, it is possible that a requirement of a detailed prior written statement of reasons for termination may discourage unjust, trumped up, or simply casually erroneous dismissals.[52] This should be apparent to ordinarily perceptive individuals. But even if such persons tend to irrationally discount the value of such procedures, because they are valuable only on rare occasions, unions, or bargaining agents, are formed and paid partly to develop the insights that avoid such irrational results. If, as is assumed by hypothesis, the detailed prior written statement requirement is of value only rarely, this reflects in part the rarity of involuntary termination. If such a statement is rarely prepared, the cost of doing so will, as a percentage of the employer's budget, be low. If the cost to the employer of moving to a detailed prior written statement rule is relatively low, the issue would seem readily bargainable from the employer's standpoint.

To the extent that such a requirement would impose any costs on the employer, the employer's reluctance to agree to it is justifiable on progressive grounds. Every small reduction in the cost to the employer of dismissal allows, to that extent, the employer to take a chance on hiring disadvantaged, disfavored, or marginal potential employees, beyond what would be legally compelled, on the basis of reduced initial screening and filtering costs.[53]

Finally, from the employees' standpoint, at least some minimal weight may be attached to the ease or difficulty of "explaining away" an involuntary termination, to oneself, or to prospective future employees. The greater the available process, the greater the difficulty in credibly claiming that the dismissal is anything other than an accurate reflection on one's competence. Minimal termination procedures may ease the transition into post-termination employment.[54]

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51. *See* Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 117-18 (P. Kurland, G. Casper & D. Hutchinson eds. 1983).

52. *See* Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 86 (1976).

53. *Cf.* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 972 (1984)(making an analogous argument in the context of at will dismissal contracts).

54. A similar point is made in *id.* at 970, again in the context of at-will employment contracts. The psychological costs of increasingly unassailable accuracy in unfavorable personal evaluations is a major theme of the celebrated fantasy, M. YOUNG, THE RISE OF THE

While it has, then, proven irresistibly tempting to courts to "benignly"[55] reinterpret statutes to provide termination procedures greater than those bargained for, we should not be surprised if the result of benign judicial intentions is less of what employees happen to actually value more, any more than if, in a spirit of similar benevolence, the courts mandated, say, compulsory unpaid afternoon work breaks.

Of course, the benefits accruing to the employer, at least in the first instance, from modest, voluntarily arrived at procedural minima are clear, and the costs to the employer of truly arbitrary or unfair dismissals are similarly clear. Even if there is only a minimum level of contractually-derived procedure required in the event of a termination, there are obvious practical disincentives to arbitrary dismissals. Any termination perceived to be arbitrary may, for example, lead the most competent employees to reassess the security of their own position, and to seek to transfer from the organization.[56]

Relatedly, any arbitrary dismissal imposes organizational costs that often are borne by the arbitrary decision maker himself. Most obvious is the cost of locating, selecting, and training a replacement for the dismissed employee who may well work out less well than the terminated employee, who, by hypothesis, was perfectly competent.[57] If it is argued that employees may tend to be largely fungible, at least in the long run, with replacement workers likely to be no worse than one arbitrarily dismissed, this in itself suggests why government employers may be willing to acquiesce in very low actual involuntary dismissal rates, as long as the procedural cost of the rare dismissal is kept relatively low.

Of course, in cases of a genuinely erroneous or ill-founded termination, it will be in the direct and substantial "investment" interest of both the employer and the employee to allow any reasonable opportunity for informally disabusing the decisionmaker of her error. Beyond cases of genuine employer error, however, the employers may well wish to pay some price to avoid costly "curtailment of administrative discretion and . . . freedom to rely upon their intuition, their impressions, and their underlying goals, aims, and values when making discretionary decisions."[58]

While the employers, or the organization in some official sense, bears

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MERITOCRACY (1959).

55. The phrase is drawn from Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 471 (1977).

56. *Cf.* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 968 (1984)(at will employment context).

57. *Id.* at 974 (at will employment context). *See also* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 170 (1983)(organizational incentives to minimize arbitrariness).

58. Simon, *supra* note 57, at 157.

much of the cost imposed by any employees retained only because a great deal in the way of procedures is required for termination,[59] it must be remembered that the ordinary, competent employees pay a portion of the price of co-workers that create unnecessary work, require extraordinary supervision, or undermine moral. This point will be obvious to no one as much as to the employees, or their bargaining agents, and their negotiating incentives and priorities should be appropriately affected. Employees may reasonably feel that their less competent colleagues are already sufficiently undislodgeable, for reasons unrelated to the judicial enhancement of due process sought by the claimant in cases like *Roth* or *Arnett*.

Precisely because the government agency need not turn a profit or face unequivocally the discipline of the market, there are unusually large opportunities for a government agency to accomodate, and accomodate itself to, the less competent employee, short of termination. Once procedure in excess of that contractually acceptable to the parties is imposed, though, the process is difficult to stop. As has been pointed out, the task of preparing a detailed written statement of reasons for dismissal before termination may well not be onerous in a given case, but the spectre of a hollow, formalistic, largely boilerplate statement of reasons by the employer virtually demands inquisitive judicial review of the substantive adequacy of the statement of reasons, at greater cost.[60]

There is thus every reason to suppose that the interests of uncoerced, rational government employers and employees would converge, at least as a first approximation, on the sort of contractually-based, express, statutorily-embodied procedures relied upon by the employer in cases such as *Roth* and *Arnett*. This is of course not to suggest in the slightest that contractualism between or among interest groups provides a descriptively or normatively fully satisfactory account of the development of constitutionally adequate statutes.[61] There is no reason, at least to this point, to assume that the factors left out of account on a contractual theory should systematically undermine the bargains struck, in such a way as to require additional, judicially imposed procedures.

It should also be remembered that a contractual analysis in this context draws not only upon any contractual understandings reached and embodied at the statutory level, when the legislation or regulations are drafted, but the contractual process inherent in the decision by every individual prospective government employee to accept or reject an offer of government

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59. *See* Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3, 29 (1983).

60. *See* Simon, *supra* note 57, at 158-59.

61. *See* Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1549 (1983)("a gross oversimplification to regard most statutes as the product of a bargain among . . . organized interests").

employment on the terms, including procedural rights on termination, specified in the government's offer.[62] Contractualism thus operates at two levels. At both, as a rule, a contractual analysis, by virtue of its normative strength, argues generally in favor of an expanded Rehnquist-like approach, and against the view currently held by a majority of the Supreme Court. This is chiefly because unconstrained government employers and employees would tend to agree, for the reasons referred to above, on the extent of procedural protection acceptable to Justice Rehnquist, but not to the majority of his colleagues.

V. CRITICISMS OF THE REHNQUIST APPROACH AND A CONTRACTUALIST RESPONSE

A. The Role of Due Process Values

The response to Justice Rehnquist's approach to these issues has been generally frosty. One commentator has characterized the academic response as one of "repulsion."[63] None of the standard criticisms is cogent, however, as against a Rehnquist-like analysis, as elaborated in the above contractual terms.

The academic critique of the Rehnquist view overlaps only to a limited degree with the judicial critique, or the current majority view. The judicial critique was recently summarized in *Loudermill*:

> the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived [sic] except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures for its deprivation any more than can life or liberty. . . . "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an in-

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62. *Cf.* Walker v. Rowe, 791 F.2d 507, 510 (7th Cir. 1986), in which Judge Easterbrook, in a somewhat different context, observes that "[t]he state may not dragoon people to be [prison] guards. Would-be guards, represented by their labor unions, may decide to accept a little less safety in exchange for a little higher pay." Judge Easterbook concludes that the employees cannot then "turn around and say that the constitution required that safety be a larger component of the total package." *Id.*

Even assuming a purely contractual analysis, though, Easterbrook's conclusion may be hasty. A contract defense such as substantive unconscionability may apply in the context of life-or-death safety conditions not specified in an employment contract, if such a defense applies anywhere. An issue of degree of procedural detail upon termination, where those procedures are plainly spelled out in advance, less obviously raises unconscionability issues.

63. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3, 29 (1983).

> terest, once conferred, without appropriate procedural safeguards."[64]

The academic critique draws upon and inspires the judicial critique, but is broader and is more leisurely, extensively argued.

Perhaps preeminent among the variety of themes developed as a critique of the Rehnquist approach is that of the value of intrinsic human dignity as mandating the availability of some minimum level of dismissal procedures, presumably in excess of those prescribed by statute. The theory is that the additional procedures "indicate respect for human beings, and a commitment to treat people as ends rather than means."[65]

As an abstract matter, of course, it indeed seems violative of an employee's dignity to arbitrarily dismiss her without some minimal procedural safeguards. Respect for individual autonomy also suggests, for example, that if a terminated employee knowingly chooses to run the risk of additional embarrassment and humiliation that may result from a costly process of discovery and cross-examination, the law should not paternalistically shield the employee from that choice.[66]

To the extent that a Rehnquist-based approach simply points to a statute conferring a specified level of procedures and asserts the authoritativeness of the statute, even in a constitutional context, it may be vulnerable to such dignitary-based criticisms. Not all validly enacted statutes comport with the dignitary claims of all persons they affect.

But to the extent that a Rehnquist-based approach is developed along the contractual lines suggested above, the dignitary critique seems misplaced. The crucial error of the dignitary critique becomes its failure to recognize that there is obviously dignitary value in courts' reasonably treating government employees as autonomous, competent, rational actors capable of appropriately entering into and being bound by their own decisions, or their own contracts, or those of their agents.

When the procedural rights and obligations of the parties were being

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64. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985)(quoting Arnett v. Kennedy, 416 U.S. 134, 167 (Powell, J., concurring in part and concurring in result in part))(brackets in *Loudermill*). This decisive rejection of the Rehnquist analysis in *Arnett* has been remarked upon in such cases as Bailey v. Kirk, 777 F.2d 567, 574 (10th Cir. 1985) and Brasslett v. Cota, 761 F.2d 827, 836 n.7 (1st Cir. 1985).

65. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1110 (1984). *See also* Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: DUE PROCESS 126, 131 (J. Pennock & J. Chapman eds. 1977); Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U.L. REV. 885, 914 (1981).

66. *See* Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in XVIII NOMOS: DUE PROCESS 172, 174-75 (J. Pennock & J. Chapman eds. 1977).

initially hammered out, or when the individual employee entered into her own employment agreement, involuntary termination of employment was merely a risk, presumably a low risk. Once the risk materializes, and becomes a reality, the employee's incentives, costs, priorities, and preferences are of course hugely different. The employee may even choose to impose costs on the employer, for reasons of frustration or revenge, extending beyond self interest.

The employee has, on our theory, already answered the question of minimum procedures consistent with individual dignity. To focus on dignitary matters beginning only with the notice of termination is wrongly atemporal. Dignity and autonomy require at least some explanation for treating the employee as not competent to enter into antecedently quite reasonable and fair contracts as to employment terms, and procedures in the event of termination.[67] Under the guise of a concern for dignity and autonomy, the critiques of our elaborated Rehnquist model evidence their own basic paternalism.

Our discussion in the preceding section indicates the rationality of an employee's failure to insist at the time of contracting on the sorts of procedures now mandated by the Supreme Court majority. In general, the more elaborate and costly[68] the procedures, including such aspects as adversary discovery at the extreme, are to both parties, the greater the logic of employers' offering and employees' accepting some less elaborate set of procedures, in exchange for some greater amount of other benefits, perhaps including practical job security. Dignity, post-termination, cannot reasonably be simply invoked as a constitutional trump card.[69]

It thus misses the point to assert that the dignity of the employee cannot be made dependent upon potentially defective majoritarian political processes, or mere legislative fiat. While further response to this approach will be made below, the basic point, discrimination problems aside, must be that contractualism adds an element of bindingness, apart from contract defenses, absent from a merely externally imposed legislative standard.[70]

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67. Richard Epstein has written, in a somewhat different context, that "[w]ith employment contracts . . . we are dealing with the routine stuff of ordinary life; people who are competent enough to marry, vote, and pray are not unable to protect themselves in their day-to-day business transactions." Epstein, *In Defense of Contract at Will*, 51 U. CHI. L. REV. 947, 954 (1984).

68. As Professor Epstein notes, process costs will tend to be high, at the judicial stage, as summary judgment will rarely be appropriate, given that employer motive, for example, will often be at issue. *See id.* at 970.

69. *Cf.* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 151 (1978).

70. *Cf. id.* at 150. *See also* Tushnet, *The Newer Property: Suggestions For the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 284 (P. Kurland, G. Casper, & D. Hutchinson eds. 1976). Professor Tushnet points to the problem of politicized control over

A pattern is established by the analysis of the dignitary value critique. Any number of academic critiques of the unelaborated Rehnquist model, alleging insufficient attention to any number of "due process values," will be undercut by a contractual elaboration of the Rehnquist approach.

Professor Redish, for example, has sought to establish the participation of an independent adjudicator as a necessary condition for procedural due process.[71] Ordinarily, of course, this requirement will not help distinguish the Rehnquist or the contractual approach from the current majority approach, as an independent adjudicator is normally provided under either approach. Even if no independent adjudicator is available, as seems true, at least at an initial stage, in *Arnett v. Kennedy*,[72] it is far from clear why even this basic element is utterly unbargainable.

Even assuming some risk aversion on the part of an employee, it is perfectly reasonable for the employee to consider the low probability of an involuntary discharge, or the arguably low probability of the reversal of an involuntary discharge due precisely to the independence of the adjudicator. Especially if there is not full and complete adversariness between government employer and employee, there may even be something of a tradeoff of independence of the adjudicator for the intimate familiarity with the office and the employee that a less independent, formally neutral adjudicator may provide.

A similar response can be made to the suggestion of Professor Mashaw that the value of rationality itself requires that in the context of involuntary dismissal of government employees, "a reason must be provided at a constitutional minimum."[73] The amount that reasonable employees would be willing to pay, in effect, for a contractual guarantee of this right would be minimal. Waiving, or bargaining away, this right is perfectly sensible from the standpoint of employee self-interest or utility.

One obvious consideration for the employee at the time of contracting, apart from the minimal likelihood of involuntary dismissal, is that "[b]y the

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lower level bureaucrats, and their vulnerability to termination in that regard. This problem was of course partially ameliorated by the Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980).

71. Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986).

72. *See* 416 U.S. at 197 (White, J., concurring in part and dissenting in part).

73. Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U.L. REV. 885, 928 (1981). *See also* Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: DUE PROCESS 126, 127 (J. Pennock & J. Chapman eds. 1977)(values of revelation or explanation and participation in the termination decision). *But see* Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 79 n.69 (1976)("participational aims are of marginal importance to government job security").

time the matter has degenerated to the point where outright dismissal or nonrenewal is likely, there has usually been substantial discussion and disagreement, and both sides have developed a fairly good idea of the other's views."[74]

Some form of statements of reason, explanation, participation, opportunity to respond, and to amend one's behavior are virtually woven into the normal operation of the government office, at least at an informal level. To the extent that a statement of reasons requirement is constitutionalized beyond this level, it is not of significant value to the employee, especially at the time of contracting, and may be perceived as costly by the employer, in that at some point, the formal judicialization of a statement of reasons requirement impairs the government's ability to act on the basis of what it intuitively, subjectively knows, but has difficulty in unassailably articulating.

It is also important to recognize in this context that contracts between employers and employees may be limited in their scope and contemplation. Just as employees do not normally intend to agree to subject themselves to the statutorily unsanctioned prospect of being dismissed simply on the grounds of race or sex, so there will ordinarily be no evidence that an employee has consented to be given less in the way of notice and explanation for termination than employees of a different race or sex.

Even if we assume indifference on the part of the employer to the dignitary concerns of the employee, it is worth bearing in mind that the employer's undeniable interest in reasonably accurate decision-making procedures regarding employee termination already largely accomodates and overlaps with employee dignitary interests. Termination decisions made hastily, arbitrarily, in secret, without consultation, may not only not conduce to the employee's dignity in that respect, but they will also tend to be less accurate or sound, contrary to the obvious interests of both parties.

The courts ought not, however, exalt even an uncontroversial value such as accuracy into an end in itself, or a value beyond that fairly agreed to by the relevant parties. While we want to "ensure" accuracy in government employment decisionmaking,[75] it is far from clear that we want to second guess, or violate the expressed preferences of, the directly affected parties as to the price of an additional increment in accuracy. Beyond a certain contractually recognized point, additional accuracy is simply not cost-effective.

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74. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 188 (1983).

75. *See* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1102 (1984).

What has been said of the due process values discussed particularly above may be said of due process values in general. In certain respects, it may not be harmful to think of the requirement of due process as protecting the values specified above, as well as others.[76] The harm lies in supposing, unreasonably, that freely negotiating parties would agree to maximize some particular value, or the sum of a set of due process values, whether the interests of the parties conflict or not.

B. Due Process and Protection of the Powerless

The literature critical of the Rehnquist approach also concerns itself more broadly with the importance of protection of "the politically weak and powerless"[77] from "oppression"[78] of individual employees or from procedures otherwise "intolerable in a humane society."[79] The crucial assumption of such a critique, of course, is the status of the employee, or the government employee union, as a passive, helpless, powerless victim, rather than a minimally competent, autonomous, ordinarily rational actor.

This unargued for assumption is easily falsified. The most obvious line is to note the incompatibility of employee powerlessness with historically remarkably low involuntary dismissal rates for federal civil service employees.[80] It is simply implausible to characterize government employees, or their unions, as insufficiently powerful, politically or otherwise, to insist on higher standards of procedure upon dismissal, where they have been able to extract, de facto or de jure, such profound concessions elsewhere.[81]

There are, of course, contexts in which a claim of majoritarian tyr-

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76. *See* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 469 (1986).

77. Comment, *Fear of Firing*: Arnett v. Kennedy *and the Protection of Federal Career Employees*, 10 HARV. C.R. - C.L. L. REV. 472, 483-84 (1975).

78. Rubin, *supra* note 75, at 1119.

79. Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process In the Administrative State*, 62 CORNELL L. REV. 445, 451 (1977). *See also* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 159 n.214 (1978)(noting the absence of the use of the term "compassion" from the Court's language).

80. *See supra* text accompanying note 44.

81. Even writers with sensitivity to some of the more doubtful assumptions of many of the Rehnquist critics are subject to occasional lapse. Professor Williams writes that "[s]o long as the government keeps a 'beneficiary' on tenterhooks by making receipt or loss of a benefit discretionary, it can keep free of the trammels of due process." Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3, 13 (1983). One is not "kept" anywhere, in the relevant sense, if one has elected that position among reasonably valuable alternative positions. The state of affairs referred to by Williams is, on our approach, bargained for, consented to, and avoidable if the employees are inclined to make presumably modest concessions in other areas.

anny[82] or oppression takes on plausibility.[83] It is far from obvious, though, why a union or other bargaining agent would choose to simply abandon or waive the procedural rights upon termination of persons in the position of Roth or Kennedy, down to a trivial level, for no recompense or return. The ordinary legislative or contractual termination procedures would seem, at least facially, to cut as close to home for more established or dominant-group white male employees as for anyone else.[84]

It is conceivable that in some contexts, low or non-existent termination procedures may pose equal protection problems.[85] In our case, however, it is perfectly reasonable for minority group members, even if they feel under-represented by the union, to opt for modest levels of procedural protection, in light of a range of considerations, including low risk of termination in the first place, the availability of civil rights actions for discrimination not contemplated by their contract, or the importance of other costly goals, including hiring goals, layoff provisions, as in *Wygant*,[86] or even such matters as better severance benefits, should termination actually occur.[87]

These sorts of responses to critics of the Rehnquist approach do not in the slightest depend upon some unduly narrow conception of what constitutes a property or liberty interest for due process purposes, or upon the illusion that injuries to liberty or property are, in this context, the only sort of practically significant injury that the government as employer can inflict.[88] On our theory, the employer and employees may bargain over and negotiate an agreement as to any practically significant aspect of the job or its termination, substantive or procedural. No significant point is unbargainable, a priori, because it does not fall within some conception of what constitutes a protectable property or liberty interest.

What our approach generally rules out, for example, is not a consideration of the importance to the employee of having a job, but a judicial reweighing or rewriting of a contract, after the contingency of involuntary

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82. *See* Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U.L. REV. 885, 900 (1981).

83. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1850 n.8 (1986)(burden of layoffs placed entirely on the most junior union members).

84. In this respect, our typical case should be distinguished from cases such as United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980), where there were arguably only minimal incentives for the union to bargain effectively on behalf of the eventual plaintiffs.

85. *See* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 888 (1982).

86. *See supra* note 83.

87. *See* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967 (1984).

88. *Cf.* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 408-09 (1977); Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1095 (1984).

termination has occurred.[89] As a first approximation, this would be no more legitimate in our context than it would be for a court to weigh and balance an insured's interest in having coverage broad enough to encompass a recent serious accident against an insurer's unexpected obligation to pay out on the apparently uncovered accident.

VI. THE SCOPE OF THE BARGAIN, LEGISLATIVE DISCRETION, AND JUDICIAL REWRITING

A contractual theory of due process cannot, of course, guarantee that all such putative contracts will be unambiguous[90] and well-understood in fact[91] by the parties. Nevertheless, the courts should not simply accept without persuasive explanation that a given, or typical, employee's expectations or comprehension is selectively and conveniently confined only to the beneficial terms of the agreement.[92]

It is possible to argue that an exploitive, manipulative employer might seek to propagandize its employees into overlooking the limitations on employee procedural rights, in some fashion sufficient to prevent a contractual agreement on those limitations from ever arising.[93] It is certainly more likely, however, that if the government as employer wishes to exploit and manipulate its employees, it would in some fashion highlight and emphasize its dismissal option, and emphasize that such procedural mechanisms as a prior written statement of reasons requirement may well be of no value to the employee, if the employer is determined to generate a judicially acceptable reason.

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89. *Cf.* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 457-58 (1977).

90. *See id.* at 465.

91. *See* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 177-78 (1983).

92. See *id.*

93. The literature is equivocal on how reasonable it is to attribute knowledge of "beneficial" substantive statutory terms to the general public at large, while assuming ignorance of "restrictive" procedural terms on the part of the same public. *Compare* Grey, *Procedural Fairness and Substantive Rights*, in XVIII NOMOS: DUE PROCESS 182, 195 (J. Pennock & J. Chapman eds. 1977)("basic" substantive terms versus "highly technical" procedural terms) *with* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1259 (1982)(implausibility of assuming general citizen knowledge of statute's substantive benefits, but ignorance of restrictive procedures) *and* Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 111 (P. Kurland, G. Casper & D. Hutchinson eds. 1983)("there are lots of poorly perceived substantive rules").

We explore in greater detail below the plausibility of skewed general public awareness, due to propagandizing by either or both parties to the government employment contract. For now, the point is that by consensus, we do not assume ignorance of procedural restrictions embodied clearly and unambiguously, in statute and contract, on the part of either party, employer or employee, actively and directly involved in the contract.

If it is therefore not justifiable, all else equal, to assume that employees should know, and are tied to, substantive aspects of their employment, but are understandably remote from and faultlessly ignorant of the less attractive procedural limitations on those rights, the substance-procedure distinction will not bear the weight placed on it in this context by critics of the Rehnquist approach.[94] It is unreasonable to, without further justification, bear down harder judicially on procedural adequacy than on the scope of more narrowly substantive rights between two parties, if the contract between the parties is as much reflective of bargaining over procedure as over substance. In our typical cases, employees or their agents could and did negotiate over procedural rights and responsibilities regarding dismissal as over more obviously substantive matters. Courts should not rewrite procedural terms of contracts where they would not rewrite substantive terms, assuming the two can be coherently distinguished. In a phrase, even if substance is for legislatures, and procedures for courts, substance and procedure equally should be left to contracting parties.

The view, then, that the Rehnquist approach concedes "unbridled discretion" to the legislature, then, misses the mark.[95] At least on our interpretation, the courts are understandably to concede discretion to contracting parties as to the terms, substantive or procedural, of their own agreement. No person or party is assumed to create a substantive right, and then claim, on that basis, to establish unilaterally the limits, unduly narrow or otherwise, for the exercise of that right.

It must be admitted, or asserted, that on our theory, constitutional law does not typically add much to the already established contractual rights of the parties, at least in the central cases.[96] This is in part, however, because contract-law defenses are not without point, and because contractual obligations normally bind only contractants, and then only within the defined

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94. *See, e.g.*, Monaghan, *Of "Liberty" and "Property"* 62 CORNELL L. REV. 405, 438 (1977); Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 177 (1983).

95. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 90 (1974); Comment, *Fear of Firing*: Arnett v. Kennedy *and the Protection of Federal Career Employees*, 10 HARV. C.R. - C.L. L. REV. 472, 482 (1975)(legislature vested with unlimited discretion re procedural rights where it created statutorily the substantive rights). *See also* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1070 (1984); Tushnet, *The Newer Property: Suggestions For the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 271 (1976)(inevitable constitutional adequacy of the procedure afforded by statute on Rehnquist theory). Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 876 (1982).

96. *See* Tushnet, *supra* note 95, at *id. See also* Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U.L. REV. 885, 891 (1981); Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 467 (1986).

scope of their actual agreement.[97]

There is no reason to assume generally that the Rehnquist approach makes "the applicability of due process safeguards depend upon the legislature's willingness to write protective procedures into the statute."[98] Justice Rehnquist, or an exponent of his general approach, could easily view an absence of explicitly specified procedural provisions as a legislative invitation to the courts to review the reasonableness of any procedures upon dismissal followed by administrative regulation, or custom, or practice. On our analysis, a missing procedural term may, if there is nonetheless a contract between employer and employee, amount to an invitation to supply a reasonable procedural term. If "[p]rocedural rules usually are just a measure of how much the substantive entitlements are worth,"[99] or the "price" of the substantive term, our theory would at this point merely hold open the possibility of the court's supplying a reasonable price, or procedure, term.[100]

There remains some point, on our theory, to classifying a wrongful government termination as a due process right violation, in addition to amounting merely to a breach. That a government breach is also a violation of constitutional right adds to its gravity to the general public, and therefore to the costs to the government of engaging in the prohibited behavior. This is apart from any procedural or jurisdictional advantage that may accrue to a plaintiff who is able to allege a constitutional, as opposed to purely contractual, wrong.

From the perspective developed to this point, it becomes clear why there is no general need for even a moderate, restrained version of substantive due process as a response to the Rehnquist theory. To the degree that the parties have entered into a valid, legitimate contract governing the substance and procedure of dismissal rights, there will tend to be no supporting social consensus on the importance or propriety of simply tipping the scales in favor of one of the parties, in such a way as to activate Professor Tushnet's substantive due process approach.[101]

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97. *See Loudermill*, 105 S. Ct. at 1502 (Rehnquist, J., dissenting)(quoting *Arnett*, 416 U.S. at 152 (plurality opinion)) (applying the Rehnquist approach only where the legislature has clearly annexed a specific set of procedures—our approach would examine first the scope and limits of the contract regarding procedures).

98. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 131 (1978).

99. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 113 (P. Kurland, G. Casper & D. Hutchinson eds. 1983).

100. For the permissibility of judicially supplying reasonable price terms, where there is a valid but incomplete contract, *see, e.g.*, S.F. Bouser v. F.K. Marks & Co., 96 Ark. 113, 131 S.W. 334 (1910); Sitzler v. Peck, 162 N.W.2d 449 (Iowa 1968); Konitsky v. Meyer, 49 N.Y. 571 (1872).

101. *See* Tushnet, *The Newer Property: Suggestions For the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279-80 (P. Kurland, G. Casper & D. Hutchinson eds.

Professor Van Alstyne, who has criticized the substantive due process approach,[102] himself goes on attempt to build a reasonably potent conception of due process, in the form of "freedom from arbitrary adjudicative procedures,"[103] into the constitutional concept of "liberty" itself.[104] The most important response is to simply note that it is in fact judicially arbitrary to override the expressed wishes of the parties to a contract, assuming only the rights and interests of only the parties are concerned, where there is no showing of some sort of familiar contract-law defense or excuse. "Arbitrariness" that is fairly bargained for is not arbitrary in a judicially corrigible sense.

It has been argued, finally, that the Rehnquist approach rests on a "dubious" expressio unius assumption that where the legislature specified a particular set of procedures upon job dismissal, it did not intend to allow judicial imposition of more elaborate procedures not followed by the government employer.[105] Whatever the plausibility of suggesting that this assumption overreads legislative intent in providing for particular procedures upon dismissal, this criticism is obviously less persuasive in a contractual context. Parties to a contract do not ordinarily, in the absence of demonstrable mutual mistake, agree upon one set of procedures, merely to establish a "floor" or minimum that can be raised and made more elaborate upon the argument of one, but not the other, party. To agree to procedural rights of a certain value is not to agree to perhaps be subject to procedural rights of a different value.[106]

VII. CONTRACT LAW DEFENSES TO CONTRACT ENFORCEMENT

Even on a contractual theory of due process, of course, not all contracts should be enforced as written. Sometimes, as we shall see below, the interests of non-contracting third parties may dictate or legitimize a judicial re-writing of one or more terms of that contract. More narrowly, there must be some role for at least some of the variety of historically recognized contract defenses.

A contractual theory therefore cannot invariably adopt the view of

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1976). *See also* Saphire, *supra* note 98, at 148-49. *But see* Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process In the Administrative State*, 62 CORNELL L. REV. 445, 481-83 (1977).

102. *See* Van Alstyne, *supra* note 101, at *id.*

103. *Id.* at 487.

104. *Id. See also* Saphire, *supra* note 98, at 144.

105. *See* Comment, *Fear of Firing*: Arnett v. Kennedy *and the Protection of Federal Career Employees*, 10 HARV. C.R. - C.L. L. REV. 472, 486 (1975).

106. *See* R. POSNER, THE FEDERAL COURTS 271 (1985)("if the statute is just the result of a clash of interest groups, adding remedies to those expressly provided in the statute may upset the compromises").

Judge Posner that "where the lines of [legislative] compromise are discernible, the judge's duty is to follow them, to implement not the purposes of one group of legislators but the compromise itself."[107] Some traditional sorts of contract defenses, such as incapacity, infancy, or intoxication,[108] will be plainly inapplicable. Other contract defenses, including mistake, impracticability, frustration of purpose, and even duress, misrepresentation, and unconscionability, may be less obviously inapplicable,[109] if perhaps only in rare circumstances.

The due process cases have not explicitly raised or relied upon any notion of contracts of adhesion or unconscionability,[110] for example. Even if the cases were judicially analyzed in contract terms, this would largely be explainable on the grounds that government employees "are not infants, impressionable heirs, or . . . prisoners of war."[111]

It may be unduly hasty, though, to simply conclude that fairness permits dispensing at the outset with any defense of unconscionability raised by a dismissed employee who seeks more elaborate termination procedures than those actually followed. At least at the broad legislative stage, there may be evidences of "corruption—concentrations of power, information gaps, and so on."[112]

However reluctant we may be to entertain the notion that, for example, at the legislative negotiating stage, a government union may be powerless or manipulated into ignorance of significant facts, the possibility of unconscionability in application under particular constellations of fact is less easily dismissed. The argument could be made, certainly, that under the actual facts of *Arnett v. Kennedy*,[113] or a variant of those facts, a defense of unconscionability, or that the contract had failed or been frustrated of its essential purpose, should be entertained. After all, in *Arnett*, "[t]he pro-

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107. *Id.* at 289. Judge Easterbrook argues that "[i]f statutes are bargains among special interests, they should be enforced like contracts." Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 18 (1984). Judge Easterbrook does not, for his purposes, raise the question of the possible role of defenses to formally valid contracts, or of the impingement of the contract on the rights or legitimate interests of third parties, or the application of this principle generally in due process contexts.

108. *See, e.g.*, Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986).

109. *See id.*

110. *See* Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3, 7 n.17 (1983)(referring to notion of contract not between parties but between state and its citizens).

111. Epstein, *Unconsionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 304-05 (1975).

112. *See* Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U.L. REV. 885, 922 (1981)(referring to corruption of the "legislative process" itself).

113. 416 U.S. 134 (1974).

ceeding was to be conducted and decided by the very person whom [Kennedy] had allegedly slandered, who had brought the complaint against him, and who would then decide whether the complaint was correct."[114]

VIII. THE INTERESTS OF THE PUBLIC AS A NON-PARTY TO THE CONTRACT

A. Introduction

It is uncontroversial that the rights and interests of third parties, including those of society at large, may limit the enforceability of agreements freely entered into by the contractants.[115] This may impose limitations on our otherwise sound inclination to routinely and mechanically enforce the sorts of employment agreements we have referred to.[116]

Of course, the contracts we have been concerned with are normally at least partially embodied in a legislative statute. A statute is at least nominally the act of agents of the public. Is there a sense in which it is reasonable to view the society, or large segments of it, as not a party to the contract, in the form of whatever the legislature has done? Further, even if the public is permitted third party status with regard to the employment contract, are there any cognizable public rights or interests which could be said to be interferred with or abused in a typical employment termination case?

Our argument will be, issues of standing and justiciability aside, that the general public, in a very practical sense of the body of ordinary private citizens, authorizes the acts of its legislative agents, but is plainly not as substantially and directly involved or concerned in the drafting or production of the legislative contract as the recognized negotiating parties. The public may be bound by legislative acts, and government employees may be bound by the authorized acts of their legislative bargaining agent, but the degree of intimacy, focus, and attention devoted is qualitatively different. There is clearly a sense in which government employers and employees, through their lobbyists or agents, may hammer out a contractual compromise in the legislative forum without the mass of ordinary citizens taking, directly or through their agents, the role of independent, active negotiators, promoting their interests in a knowledgable way, so as to distinctively shape the result.

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114. Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process In the Administrative State*, 62 CORNELL L. REV. 445, 461 (1977).

115. *See, e.g.*, Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763 (1983). *See also* Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 476 (1980).

116. *Cf.* Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 18 (1984)("the appropriate plaintiffs will be those who claim 'breach,' not the larger class of persons affected by a bargain to which they are not 'parties' ").

The employment contract, even as legislatively embodied, then, may be, and has been above, fully explainable on the basis of considering the interests of only government employers and employees. No term of the contract reflects a public interest distinct from the interest of one of the two actual bargaining parties.

To further suggest why this might be so, as well as to suggest the sort of public interest that might be neglected by this process, is the major task confronting us below. We may begin by proposing that the form, or structure, of a legislatively embodied contract, or any statute, as opposed to the content of the statute in a narrow sense, may adversely affect the public interest. A statute may, more particularly, lend itself unduly to the propagandizing of organized interests by virtue of the form or structure of the statute. If the general public is especially vulnerable to misleading impressions because of the way the statute, or contract, is written or put together, we have at least a prima facie reason for preferring, from a public interest standpoint, that the contract or statute be drafted in a way that tends to discourage such propagandizing, even where the form or structure of the contract resulted, along with its content in a narrower sense, from the uncoerced bargaining of the organized interests.

B. "Tense" Statutes and the Production of Propaganda

In our context, propagandizing of the general public may be unduly facilitated by a feature shared to a greater or lesser degree by any number of government employment statutes. This feature may be referred to as structural "tenseness." That a statute or contract is "tense" in this sense does not at all mean that it is self-contradictory or in any degree ambiguous. The opposite of a "tense" statute would instead be something like a statute that is perspicuous, or that has structural integrity.

The tenseness in some or all typical government employment contracts may arise from the tendency to rhetorically exalt and pay homage to the notion of security from unjust or arbitrary employment termination in one provision or passage, while quite clearly, unequivocally, and effectively establishing what might seem, in light of the foregoing provision, a disproportionately underdeveloped set of procedures to implement the laudable goal of freedom from arbitrary dismissal.

As between the presumably competent, knowledgable contracting parties, it may well be arbitrary to find any such disproportion between right and procedure. The parties may have simply agreed to pay only lip service to a particular set of values. But for the general public, uninvolved with the drafting, there may be a clear difference between apparently giving certain rights to employees, only to clearly take them largely away, and never inserting the largely rhetorical, largely unenforceable language of employee

rights in the first place. The general public may ordinarily know only a part of the story, as told, self-interestedly, by the organized, actively involved groups. The public is less vulnerable to manipulation by its own legislative agents, or by government employers, or by employees, when the statute or contract clearly and perspicuously accords only limited employee procedural rights, instead of a fanfare of largely rhetorical recognition, or apparent recognition, of broader employee rights, where that recognition is then undermined, especially where it may be in the perceived interest of legislators, employers, and employees, to trumpet the rhetoric, as opposed to the narrower substance.

This is not to suggest that for ordinary citizens, substantive provisions are clearer or inherently more prominent or visible than procedural provisions. It is only to suggest that it is easier to propagandize where something is apparently given but then, clearly, largely taken away than when it is largely never granted in the first place. There is a recognizable public interest in legislative silence, or modest speech, as opposed to extolling a value, only to largely negate its achievement.

Such statutes are admittedly not self-contradictory or logically defective in any strict sense. But as Lon Fuller has noted, "[i]t has been suggested that instead of speaking of 'contradictions' in legal . . . argument we ought to speak of 'incompatibilities,' — of things that do not go together or do not go together well."[117] However well the employment contract provisions in our case go together for the directly involved parties, they may "not go together well" from the perspective of the interests of the general public, if they promote the possibility of manipulative political communications.

The problem is not precisely one of failure to disclose, or to conspicuously disclose, or even lack of candor,[118] in the sense that an unwary consumer might be victimized by an inconspicuous disclaimer of a warranty, since in our cases the statutory language affording only limited procedure upon termination is assumed to be clear and prominent. However, neither the apparent "give" nor the "takeaway" of employee rights are salient, for the general public, until explicitly brought to the public's attention.

All directly affected interest groups, or even one of them alone, may see an interest in calling the public's attention to the language of the apparent "give," and not the "takeaway" or procedural language. Employers may want to appear beneficient and progressive. Employee unions may want to project an image of competence and effectiveness in securing express recognition of their rights. Legislators may want to appear to have accomplished something dramatic, or in accordance with the interests of employers or

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117. L. FULLER, THE MORALITY OF LAW 69 (rev. ed. 1969). *See also* Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 575-76 (1985).

118. *Cf. The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 87 (1974).

employees. No interest group may, at least for a time, have a strong interest in promoting a more balanced public understanding of the actual state of affairs. The structure of "tense" statutes promotes this potentially unholy alliance by entering the beneficent language of grant or recognition into the statute, in an apparently serious way, only to have it seriously undercut, by agreement, by another provision.

It is possible to attempt to legitimize this sort of format as one of symbolism, or of merely hortatory language, but the costs and risks of this sort of "tense" statute do not fall exclusively on the contracting parties. "Placebo actions do not merely have a nil effect. The removal of an issue from the political agenda by the announcement of a placebo policy makes it difficult to get attention paid to arguments for more substantive policies."[119] In the long run, the danger is that just as public cynicism may result if the imputed and actual purposes of statutes vary too widely,[120] public cynicism may result when and if the public realizes that its induced understanding of a statute, or a program such as social security, is misleadingly sanguine.

Against this background, the observations of Professor Michelman may take on some force, if they do not create a cause of action:

> *Arnett* involved a statute which . . . purported to protect tenured public employees against dismissal except on certain enumerated grounds, thus creating an entitlement; but . . . in the same breath curtailed access to explanatory procedures in support of the entitlement.[121]

We have assumed that this argument is ordinarily of little moment as between employers and employees, as contractual parties, who negotiated for limited procedures. The argument gains force if they point to the statute's undue manipulability.

To exhibit the "tenseness" detectable in many of our employment termination statutes or contracts, we might simplify them along the following lines: "1. [Because of the vital importance of employment security,] all permanent or established or tenured employees may be dismissed only for limited, specified grounds. 2. [But] the procedural or process rights of such employees in the event of dismissal are quite modest." Generalized, the form becomes: "Because X is a vital interest, all A's are hereby entitled to X. 2. The right to X is only weakly or insecurely enforceable."

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119. B. HOGWOOD & B. GUY PETERS, THE PATHOLOGY OF PUBLIC POLICY 173 (1985). *But see* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 232 (1976).

120. *See* Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1555 n.69 (1983).

121. Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: DUE PROCESS 126, 133 (1977).

Tense statutes may exist in several varieties. In the due process context, Professor Monaghan raises, for other purposes, the possibility

> that a state motor vehicle statute invested automobiles with all the attributes of property as that term is generally understood, but also provided that no person who bought a car after the statute was passed would be deemed to have a "right to continued" ownership as against the state.[122]

An obvious real-world instance of a tense statute's lending itself to intense propagandizing on its substantive side, only to have the "takeaway" provisions highlighted upon a due process challenge, is the social security benefit case of *Flemming v. Nestor*.[123] There, the Court pointed out that the "escape clause" provisions of the statute clearly reserved the right to diminish or divest what were often propagandized as somehow accrued or entitlement-based, and obviously practically important, benefits.[124]

An arguably more ambiguous or equivocal,[125] but still recognizably tense, statute was litigated in *Pennhurst State School and Hospital v. Halderman*, [126] in which a statutory "bill of rights" provision guaranteeing the right of mentally retarded persons to appropriate treatment in the least restrictive environment turned out to be largely unenforceable.[127]

Plainly, a largely unenforceable "bill of rights" may be contrary to the public interest as lending itself to propagandizing,[128] even if the purported

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122. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 440 (1977). One would hope and expect that the price of the cars bought after the enactment would reflect the reality that the state had in effect created a bailment at sufferance.

123. 363 U.S. 603 (1960).

124. *See id.* at 610-11.

125. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 910 n.125 (1982).

126. 451 U.S. 1 (1981).

127. *Id.* at 8; *See also* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 888 (1982)("legislative fraud"); Terrell, *Property and Due Process*, 70 GEO. L.J. 861, 895 (1982)(focusing on the analysis of Justice Brennan).

128. *Cf.* Articles 39 and 50 of the current Constitution of the Union of Soviet Socialist Republics, which rather tensely guarantee freedom of speech, with the clear, express, immediately attached limitation that such speech not be destructive of the development of the socialist system or the interest of the state.

The later caveats of course are of a substantive, rather than procedural or enforcement-process nature. The Soviet free speech clause is also of interest in showing that tenseness may afflict "public interest," as opposed to merely private interest group legislation. *See generally* Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16-17 (1984). As the Soviet free speech clause, *Pennhurst*, and *Nestor* illustrate, tenseness is often not a matter of special interest legislation lurking behind a public interest facade. *Cf.* Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232, 233 (1986).

beneficiaries of such a provision view it favorably, as a symbolic first step in eventual actual recognition of such rights.

This is not to suggest that the passage of merely hortatory or entirely precatory legislation is invariably contrary to the public interest or always deserves some judicial redress, problems of standing aside.[129] Even if the courts were free to rewrite "tense" statutes or contracts, this authority would not encompass statutes with no schizophrenic or ambivalent tendencies. If employees, or mentally ill persons, or whomever, are to be accorded no rights under a statute, that status can be established in ways other than through undermining a proclaimed "bill of rights," language which in many quarters is historically taken with some seriousness. If a statute is to be hortatory, it can be drafted perspicuously to reflect that intent: "all else equal, it would be splendid if employees could be utterly secure from unjust or mistaken dismissal, and this ideal should be borne in mind."[130]

C. "Tense" Statutes and the Problem of Collective Action

Tense statutes impose costs, and the supply of tense statutes may be excessive, if the costs of tense statutes are not fully internalized.[131] Interest groups, as well as politicians, may speak through their statutes and contracts as well as about them, and just as the supply of polluted air may reflect the producers' failure to fully internalize such costs, so there may be excessive amounts of "polluted speech"[132] generated by our tense statutes, flowing from the interest groups and legislators to the general public.

The essence of the problem is that non-tense or perspicuous statutes are statutes that, in that "formal" or only broadly substantive respect, benefit everyone in common, at a discernible but low level. That we are speaking of the form of a statute in some sense does not immunize the non-tense statutes from the truism that "[l]aws that benefit the people in common are hard to enact because no one can obtain very much of the benefit of lobby-

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129. *Cf.* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1259 (1982); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 110 (P. Kurland, G. Casper & D. Hutchinson eds. 1983)(reference to "vacuous entitlements").

130. While the problem of tenseness is not that of legislative candor, in that tense statutes are often clear and unambiguous, without any obscurity, cloaking, or hidden purposes or motives of a selfish sort, the susceptibility of tense statutes to propagandizing poses some problems analogous to lack of candor. *Cf.* Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 255 (1986).

131. *See generally, e.g.*, Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 105 (1983).

132. The term "polluted speech" is suggested by its use, in another context, by Professor Bernard Williams, in ETHICS AND THE LIMITS OF PHILOSOPHY 101 (1985).

ing for or preserving such laws."[133]

While ordinary citizens might, in the abstract, be inclined to together pay for a clean, perspicuous, non-tense statute so as to reduce their own vulnerability to political propagandizing, their costs of organizing will tend to be high. As Judge Posner has observed with respect to organization costs, "[a]s the group becomes larger and more diverse, these costs rise; at the same time, the benefits to each member of the group become smaller or at best remain constant."[134]

There will, therefore, be some tendency for the legislative process to enhance the influence of discrete, well-organized groups, such as government employers, government employee unions, or incumbent legislators themselves, who may have a perceived interest in tense statutes, at the expense of the less well-organized general public, who may see "tenseness" in statutory drafting as without benefit and as quite possibly costly.[135]

The inability of the general public to organize to pay for or insist upon non-tense statutes results, therefore, in the excessive production of tense statutes, and in self-interested propagandizing of the general public by groups seeking to highlight the recognition of substantive rights in the statute, as opposed to the modest procedures for enforcing those rights. This result would accord with what a leading social scientist regards as a relatively uncontroversial generalization: often, the statutory provisions "least significant for resource allocation are most widely publicized."[136]

The logic of allowing some sort of judicial challenge to a "tense" government employment termination statute, even by an employee or union who was unmistakably a party to the contract for modest procedures upon dismissal is that publicity attending the judicial decision will tend to reduce the cost to the public of discovering the more inclusive, thorough reading of the statute, its proverbial bottom line.[137]

There may thus be grounds for not invariably following the rule that "when an interest group bargain is explicit, courts should uphold the bargain,"[138] even if the objecting party can raise no standard contractual defense, since there may be a systematic tendency for the legislators to underprotect a public interest in non-tense drafting. Courts may choose to rewrite job termination procedures not merely to impose their own views of

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133. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). The classic source on the general point is M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). *See also* Macey, *supra* note 130, at 231 ("the classic 'free rider' problem").

134. R. POSNER, THE FEDERAL COURTS 263 (1985).

135. *See generally*, for the basic redistributive effect, Macey, *supra* note 130, at 230.

136. M. EDELMAN, THE SYMBOLIC USES OF POLITICS 26 (1964).

137. *See* Macey, *supra* note 130, at 256.

138. See *id.* at 239.

fairness upon contracting parties,[139] but to discourage the underproduction of a classic public good, the non-tense statute. While there are quite possibly public purposes served by limited procedural rights for employees,[140] apart from the private reasons adopted by the parties in agreeing to such procedural limitations, there are no obvious public interests served by the imperspicuous, give-and-takeaway structure of tense statutes.

Assuming that statutory tenseness is found to present a justiciable issue of public injury, and some party with standing can be identified, the issue of remedy arises. Of course, having tense statutes struck down even unpredictably, in unpredictable ways, may raise the price of tense drafting. But there are two more systematic approaches to remedies issues. On the first such approach, the courts might inquire into which party alone insisted upon, or took the initiative in proposing, the largely symbolic language that is largely negated in practice by the controlling procedural language, where such procedural language had already been negotiated or was under discussion. Such a party of course may not exist, or be identifiable judicially. The basic point, however, would be to somehow penalize, as by striking down the symbolic language, the party that "caused" the tenseness. This party could be, again, either the dominant or the weaker party, for reasons of their own, if such labels apply.

On the second such approach to remedies, the court might, if it can detect a weaker and a stronger party, attempt to promote egalitarian values, while serving the public interest in improved drafting,[141] by either adding strength and elaboration to the modest termination procedures agreed upon by the parties, or striking the largely empty substantive language of right, if it is thought that this would aid the weaker party, as by depriving the dominant party of a propaganda weapon. It is of course equally possible that the employees are collectively strong, but chose to make a minor concession in agreeing to the largely symbolic language of right.

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139. *Cf.* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983)(concern over judicial upsetting of the balance of compromise reflected in a statute). *See also* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1259 (1982)(modest procedures may have been a concession to obtain any substantive entitlement in the first place).

140. *See* Stewart & Sunstein, *supra* note 139, at *id.*

141. *Cf.* Macey, *supra* note 130, at 233 (carefully ambiguous statutes run a greater risk of judicial misinterpretation than more candid, but more facially objectionable statutes); R. POSNER, THE FEDERAL COURTS 268 (1985)(language intended to fool political opponents of the interest groups may inadvertently fool the courts, thereby reducing the power of one or more interest groups under the statute).

IX. CONCLUSION

Granting the undesirability of statutes, or contracts embodied in statutes, whose form or structure leads to increased political manipulation of the broad public, or less political accountability, it is of course far from obvious that citizens should be granted standing, as citizens, to seek judicial relief from such broadly shared injuries,[142] or that a government employee or union, as a party to the underlying, non-defective contract entered into with the government employer, should be permitted to champion the rights of citizens as a whole who are not before the court. A public interest approach is thus problematic at several points on the issue of standing.

The most tenable ground, then, for judicially enforcing the procedural rights of dismissed governmental employees would be the traditional sorts of contract defenses, including mutual mistake, frustration of purpose, and perhaps unconscionability. Use of these vehicles alone might be said not to modify the bargained-for rights of the parties, since they constitute a portion of the legal framework within which all contracts are negotiated.

The overall conclusion must therefore be that the most cogent way of overcoming the various criticisms of the Rehnquist approach to procedural due process issues in our context is to reinterpret the Rehnquist approach along contractualist lines, where contractual principles are applied as between the employing government and the employees or their union at the legislative stage, or between the government employer and the individual employee or prospective employee at the stage of the individual employment contract. Results of litigated cases more in accord with the approach of the current Supreme Court majority should be reached, generally, only where the circumstances of the employee's dismissal were not within the bargained contemplation of the parties, or where the parties have not reached a legally defensible negotiated accomodation on termination procedures because of the presence of some traditional contract-based excuse or defense.

142. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1259 & 1259 n.272 (1982).